Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-129

NOVEMBER TERM, 2002

Harold and Sheila Bigelow	}	APPEALED FROM:
v.	}	Rutland Family Court
Carolyn Bigelow	}	DOCKET NOS. 544 & 546-11-96 RcFA
	}	Trial Judge: Theresa S. DiMauro

In the above-entitled cause, the Clerk will enter:

Attorney Marvin Wolf appeals an order of the Rutland Family Court awarding attorneys' fees and costs to Randy Olley, a psychologist who performed psychological testing on defendant in the relief-from-abuse proceeding underlying this matter. We affirm.

The present appeal asks us to travel once again down the " tortured and convoluted road" this case has taken since 1996 when the underlying cause was originally filed. See Bigelow v. Bigelow, 171 Vt. 100, 101 (2000). In Bigelow v. Bigelow, we affirmed the family court' s decision to award Olley $3,610 in attorneys' fees and expenses for Wolf' s violation of V.R.C.P. 26(g). Id. at 106-08. On August 4, 2000, Olley' s attorney filed a motion in the family court for an award of additional attorneys' fees and costs, in the amount of $20,917.22, associated with defending the appeal. Olley argued that she would not have incurred such fees and expenses but for Wolf' s misconduct in the family court. Wolf opposed the motion, arguing that the court' s prior order did not impose a continuing obligation to pay Olley' s legal fees and expenses, and that requiring him to pay additional fees for the appeal was contrary to the equities.

The court took no action on Olley' s motion for nearly a year. During that time, Wolf did not pursue any discovery to ascertain whether the billing statement attached to Olley' s motion was accurate and reasonable. On July 16, 2001, the court notified the parties that on August 22, 2001, it would hear evidence and arguments on Olley' s motion for fees and costs. A few days later, Wolf sought a sixty-day extension of time so that he could hold depositions and hire an expert witness to review the reasonableness of Olley' s request. The court denied the motion, and it convened the evidentiary hearing on August 22 as scheduled.

At the beginning of the hearing, the court stated that it understood that the hearing was intended to address costs related to the appeal under V.R.A.P. 39(a), and relevant attorneys' fees under V.R.C.P. 54(d)(2), as V.R.A.P. 39(f) authorizes. Apparently misunderstanding the nature of Olley' s request and the court' s citation to the Rules of Civil and Appellate Procedure, Wolf argued that the prior family court order allowed $3,610 in fees only, and Olley was not entitled to collect any additional fees or expenses. The court agreed with Wolf' s construction of the prior trial court order, but rejected his assertion that the court could not separately consider Olley' s request for fees related to the appeal. The trial court then heard testimony from Olley' s expert witness. Wolf did not present any evidence, but urged the court in argument to deny Olley' s motion. In a written decision, the court determined that Olley was entitled to an award for the

work her attorney did defending Wolf' s appeal. The court found that in a 1999 status conference, Wolf' s attorney advised the trial court that Wolf earned the sanction the court imposed by his misguided efforts at discovery on Olley, and that Wolf was " on the hook" for the $3,610 in fees. By appealing the fee issue to this Court, the trial court found that Wolf

> disregarded his own attorney' s position that he was responsible for the attorney' s fees awarded to Dr. Olley. If he had only appealed that portion of the order that directed payment of monetary sanctions to the court, Dr. Olley would not have been impacted by an adverse ruling in the Supreme Court and may have chosen not to participate in the appeal.

In other words, Wolf' s appeal of the $3,610 award to Olley was not made in good faith in light of the position Wolf took before the trial court. The court ultimately awarded Olley approximately half of what she requested, finding some of the billing entries too vague to conclude that the associated fees were reasonable. Wolf moved for reconsideration, which the court denied. A timely appeal followed.

Wolf' s appeal raises essentially two issues: (1) whether Wolf had fair notice that the court would take evidence on Olley' s motion for fees when Olley' s motion did not cite V.R.C.P. 54 as a basis for her request; and (2) whether the court should have required Olley to be present at the hearing so that Wolf could question her about the billing statement she attached to her motion. Neither argument is grounds for reversal.

Generally, a party is not entitled to attorneys' fees unless a contract or statute provides a basis for awarding the fees. In re Gadhue, 149 Vt. 322, 327 (1987). In special circumstances, the trial court may award attorneys' fees for equitable reasons. Id. Those circumstances include where one party has acted in bad faith. Id. at 329. When seeking attorneys' fees for an appeal, V.R.A.P. 39(f) provides that any request for attorneys' fees " arising on appeal shall be made by motion in the trial court pursuant to Rule 54(d)(2)." V.R.A.P. 39(f). Under the civil rule, a request for attorneys' fees must be made by motion to the trial court. V.R.C.P. 54(d)(2)(A). The motion must identify the grounds for the request. Id. 54(d)(2)(B).

In this case, Olley' s motion explained that she sought fees for the appeal because " **[n]one** of the[] fees and expenses in defending the [c]ourt' s order on appeal would have been incurred but for Mr. Wolf' s abusive misbehavior and victimization of Dr. Olley." (Emphasis in original.) Although the motion did not cite V.R.C.P. 54(d)(2) as the procedural mechanism grounding her request, the trial court correctly construed Olley' s motion as seeking fees under an exception to the so-called American Rule on attorneys' fees due to Wolf' s prior misconduct. We are at a loss to understand what additional notice Wolf needed to comprehend the nature of Olley' s request. Moreover, Olley' s motion was pending for nearly a year before the court scheduled a hearing on the matter. During that time, Wolf made no effort to discover the basis for the motion. The trial court' s treatment and disposition of Olley' s motion under our civil rules was proper.

Wolf next complains that he was prejudiced by Olley' s absence at the hearing because he could not question her about the bills her lawyer presented to the court. Even assuming Olley' s testimony would have been relevant to the matter, Wolf did nothing to secure her presence at the hearing. See V.R.C.P. 45 (setting forth procedure for issuing a subpoena to secure testimony). Wolf maintains, however, that he was surprised by both Olley' s absence at the hearing and the trial court' s decision to hear evidence on her motion. The court' s decision to go forward with the hearing, he argues, was severely prejudicial to him and we should therefore reverse the order. We reject Wolf' s argument for two reasons. First, we conclude that any surprise here was due solely to Wolf' s own deficiencies in comprehending Olley' s motion and the law applicable to it. Second, a party' s " ' failure to request a continuance at the time of surprise, except under extraordinary circumstances, serves as a waiver of the party' s right[s].' " Hartnett v. Med. Ctr. Hosp. of Vt., 146 Vt. 297, 301 (1985) (quoting Meachem v. Kawasaki Motors Corp., 139 Vt. 44, 46 (1980)). Although we find Wolf' s claim of surprise devoid of any merit, he did not ask the court to continue the matter at the time his alleged surprise arose. Under the circumstances, we find no prejudice or reason to reverse the court' s decision.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice